

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

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People of the State of Michigan,

Plaintiff

v

Damaceno R. Abrego,

Defendant

LC No. 13H15796FH

COA No. 320973

MSC No. 152111

\_\_\_\_\_  
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DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF

Date: \_\_\_\_\_

12-15-15

\_\_\_\_\_  
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<u>TABLE OF OFCONTENTS</u>	PAGE
Index of Authorities.....	3
Statement of Questions Presented.....	4
Rebuttal Arguments (With Standard of Review)	
IA. <b>The Michigan Court of Appeals did not error in vacating the sentence and remanding for resentencing.....</b>	<b>5</b>
IB <b>A Plain reading of the statute with application to the facts of this case does Not support the scoring of OV 8.....</b>	<b>6</b>
IC. <b>The controlling legal provisions from Spanke are not Dicta or otherwise Incorrect.....</b>	<b>7</b>
Summary and Relief.....	9

<u>INDEX OF AUTHORITIES</u>	<u>PAGE</u>
 <u>Michigan Statutes/Court Rules/Constitution</u>	
MCL 777.38.....	4
MCR 6.429(C).....	5
 <u>Cited Michigan Caselaw</u>	
<i>People v Abrego</i> , #320973 Unpublished (COA 6/11/2015).....	4,5,6,7,8
<i>People v Bowman</i> , #317535 Unpublished (COA 1/22/2015).....	5,8
<i>People v Cox</i> , 268 Mich App 440, 454; 709 NW2d 152 (2005).....	8
<i>People v Dillard</i> , 303 Mich App 372 845 NW2d 518 (2013).....	6,8
<i>People v Green</i> , 228 Mich 684; 580 NW2d 444, 451 (1998).....	8
<i>People v Hardy</i> , 484 Mich 430, 438; 855 NW2d 340 (2013).....	6
<i>People v Spanke</i> , 254 Mich App 642; 658NW2d 504 (2003).....	4,5,15
<i>People v Steele</i> , 283 Mich App 472,490; 769 NW2d 256 (2009).....	8
<i>People v Thompson</i> , 488 Mich 888; 788 NW2d 677 (2010).....	6

**STATEMENT OF QUESTIONS PRESENTED**

- I. Pursuant to MCL 777.38, a Defendant shall receive 15 points on this offense variable if a victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense. In the present case, the Trial Court assessed 15 points to the Defendant for OV 8. The Defendant appealed this decision and the Michigan Court of Appeals ruled that the Trial Court improperly scored OV 8, citing *People v Spanke*, finding that movement occurring in the instant case was incidental to commitment of the underlying offense. The Plaintiff now appeals the decision applying for leave to appeal with the Michigan Supreme Court. Did the Court of Appeals error in reversing the Trial Court's ruling that asportation was applicable under OV 8 and MCL 777.38?

**PLAINTIFF-APPELLANT STATES: YES**

**DEFENDANT-APPELLEE STATES: NO**

**COURT OF APPEALS STATES: NO**

**TRIAL COURT STATES: YES**

## REBUTTAL ARGUMENTS

**STANDARD OF REVIEW:** Defendant must raise objections to scoring guidelines and offense variables at sentencing in order to preserve such claims for appeal. MCR 6.429(C). Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of facts to the law, is a question of statutory interpretation, which an appellate court reviews *de novo*. *People v Hardy*, 484 Mich 430, 438; 855 NW2d 340 (2013). The Trial Court's factual determinations are reviewed for clear error and scoring of sentencing guidelines must be supported by a preponderance of the evidence.*id.*

**IA. The Michigan Court of Appeals did not commit error in vacating the sentence and remanding for sentencing.**

The Court of Appeals properly evaluated the Trial Court's actions assessing OV 8 and found error. The standard of review cited above provides precedent for the correct procedures to be taken, which the Court of appeals correctly performed. The Court of appeals found that the Defendant had made proper objections to OV 8 at the Trial Court, and thus preserved it for appeal<sup>1</sup>. The Court of Appeals was required to review the Trial Court's factual determinations for clear error and the Trial Court's application of facts to law *de novo*. The Court of Appeals correctly evaluated the record, finding that the Trial Court incorrectly found asportation of the victims, citing *People v Spanke* to correctly interpret the meaning of the statute<sup>2</sup>. *Spanke* is a published opinion and remains existing law and has been previously cited to interpret the statutory interpretation of the language of OV 8<sup>3</sup>.

The Court of Appeals, in determining error, is not confined merely to agreeing or disagreeing with the parties' arguments; rather the Court of Appeals was required to review the relevant issues *de novo*. The Court of Appeals, in analyzing the record and arguments, found that both parties and the Trial Court "failed to acknowledge that any movement of the children

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<sup>1</sup>*People v Abrego* slip op pg. 2

<sup>2</sup>*People v Spanke*, 254 Mich App 642; 658NW2d 504 (2003).

<sup>3</sup>See *People v Bowman*, #317535 Unpublished, (COA January 22, 2015), *People v Dillard*, 303 Mich App 372 (2013); *People v Thompson*, 488 Mich 888 (2010).

was incidental to the underlying offense and that incidental asportation cannot be scored under OV 8.<sup>4</sup> Thus the Court of Appeals did not error and this Court should affirm their decision.

**IB. A plain reading of the statute with application of the facts of this case does not support the scoring of OV 8.**

MCL 777.38 contains the provisions for OV 8, which concerns victim asportation or captivity. 15 points are to be assessed where: [1] “a victim was asported to another place of greater danger or [2] to a situation of greater danger or [3] was held captive beyond the time necessary to commit the offense.<sup>5</sup>”

**The victim was not asported to another place of greater danger.**

In analyzing this first provision, the facts in this case are that the Defendant drove his daughter to the video store, Family Video<sup>6</sup>. During a nightly visitation with his daughter, his daughter requested a trip to the local Family Video in order to rent a movie. Defendant left his home for the sole purpose of obtaining rental videos for the enjoyment of his daughter, and to enhance parenting time with his daughter. This Family Video store was located exactly 6.7 miles away from Defendant’s home, approximately a nine minute drive, and a fairly short distance away from his home. He then left with only the intent to return home. However, the Defendant was instead pulled over by police<sup>7</sup>. Neither the Defendant’s home, the parking lot of the Family Video store, nor any place in between, including the place where Defendant was legally and safely pulled over by the police officer, can be considered a “place of greater danger” as required by OV 8. Thus, this element of asportation cannot be established.

**The Victim was not asported to a situation of greater danger.**

In analyzing this second provision, The Defendant was charged with OWI with an occupant under age 16. He was convicted of that offense. However, nothing about the charge itself or the facts of this case create another or additional situation of “greater danger”.

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<sup>4</sup> *Abrego*, p. 3, Footnote 2.

<sup>5</sup> MCL 777.38(1)(a).

<sup>6</sup> Plea Transcript p. 9

<sup>7</sup> Sentencing Transcript pp. 9-10.

Defendant's intent was to return his child to their family home.. The nine minute drive between Defendant's home and the Family Video store is a nearly straight stretch of highway with a single turn, which was under no construction or suffering from obstruction of traffic. It is fair to say that the Defendant was driving straight to the video store and returning straight to his home. Furthermore, at no point was the Defendant driving at a high rate of speed or in an erratic manner. Nothing in the record supports that, subsequent to the Defendant actually deciding to drive while intoxicated, he put his child in a situation of greater danger. In fact, driving while intoxicated is incidental to the offense because it is an element of the actual offense. Thus this element of asportation cannot be established.

**The victim was not held captive beyond the time necessary to commit the offense.**

In analyzing the third provision, there is no evidence on the record that the victim, the Defendant's child, was ever held captive. To be held captive is tantamount to restraint and restriction and a sheer lack of choice. The child was willingly and voluntarily accompanying her father to the video store, as the child had requested her father do so. This was strictly a typical parent and child relationship, not one of captor and captive. A parent taking the child on an enjoyable errand. Moreover, since at sentencing the Trial Court did not discuss captivity in regards to the scoring OV 8, so this provision is inapplicable and inappropriate in this case<sup>8</sup>.

**IC. The controlling legal provisions from *Spanke* are not Dicta and provide the proper interpretations of the law.**

The Appellant relies on the Dissenting opinion in the present case. Specifically, the dissenting opinion states "The portion of *Spanke* the majority relies on is dicta, and even it if was not, it is simply incorrect."<sup>9</sup> However this argument fails to persuade on both accounts.

Dictum can be defined as:

an observation or remark ... concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the

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<sup>8</sup> Sentencing Transcript pp 7-9.

<sup>9</sup>Abrego, Dissenting Opinion, slip op pg.1

case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion<sup>10</sup>.

The precise issue in the present case is the application of 15 points to OV 8. The Court of Appeals in *Spanke* was also considering this exact same issue. The Court in *Spanke* cites *People v Green* to support its reasoning:

To establish the element of asportation, there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime (unless the underlying crime involves murder, extortion, or taking a hostage)<sup>11</sup>.

The *Spanke* Court makes two conclusions in interpreting the language of OV 8: 1) that asportation can be accomplished without using force against the victim, and 2) that to establish asportation, the movement of the victim must not be incidental to committing the underlying offense. These criteria are not mutually exclusive, but are both to be considered with regard to the element of asportation.

It is well settled that using or not using force is not a factor under OV 8. Only movement is relevant<sup>12</sup>. Moreover, the Court of Appeals applied the “incidental movement” test from *Spanke*, and found that the actual movement was merely incidental to the commission of the Defendant’s offense, that being OWI 2<sup>nd</sup> involving an occupant under 16<sup>13</sup>. As such, the Court of Appeals did not error and this Court should affirm their decision

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<sup>10</sup>Black's Law Dictionary (6th ed), p 454.

<sup>11</sup>*People v Green*, 228 Mich 684; 580 NW2d 444, 451 (1998).

<sup>12</sup>*Spanke, Bowman, Dillard Supra*. Regarding use of force see also: *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009); *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005).

<sup>13</sup>Abrego, p. 3 ¶1.



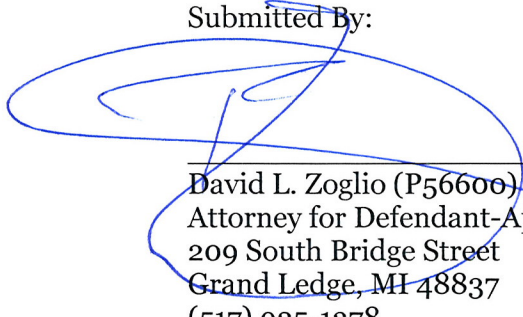
**SUMMARY AND RELIEF**

The Defendant-Appellee believes that he was incorrectly sentenced, and the proper arguments and issues were preserved and properly argued upon Appeal. The Michigan Court of Appeals correctly found an error by the Trial Court and ordered the necessary relief, to vacate the sentence and remand for resentencing. The Michigan Supreme Court must affirm the Decision of the Michigan Court of Appeals.

Date: \_\_\_\_\_

12-15-15

Submitted By: \_\_\_\_\_



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